No. 404.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

CALIFORNIA REDWOOD COMPANY, *Appellant,*

VS.

WILLIAM MAHAN, *Appellee.*

Appellant's Points and Authorities.

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APPELLANT'S POINTS AND AUTHORITIES.

This is one of several cases which were tried conjointly, and which all involve the question of the power of the Commissioner of the General Land Office to cancel timber land entries, under the Act of June 3, 1878. The case of *California Redwood Company* vs. *Litle*, appealed to this Court at the same time, and which will be submitted with this appeal, involves the rights of a *bona fide* purchaser of a fraudulent entry. The case at bar, although it presents the same evidence of *bona fide* purchase, differs from the Litle case in the fact that no proof of fraud in the entry was made at the trial; and the especial question presented by it is whether the Commissioner of the General Land Office can cancel a timber land entry for fraud without notice to the claimant or the parties interested.

Summary of Facts.

On December 27, 1882, one John C. Johnson made and filed in the U. S. Land Office, at Humboldt, California, his sworn statement under the "Timber Land Act" of June 3, 1878 (20 Stat. at Large, p. 89), making application to purchase the southwest quarter of section 15, T. 8 N., R. 1 E., H. M., in Humboldt County, California. This statement was in due form as prescribed by the Act (Trans., folio 75). On the same day the Register issued a notice of this application, requiring all persons holding adverse claims to present them within sixty days. This notice was duly posted and published for sixty days (Trans., folios 84–86). On March 13, 1883, Johnson produced two witnesses who made and filed the statutory proofs of the character and quality of the land, the absence of adverse claims, and the good faith of Johnson's application (Trans., folios 77–80). These proceedings fulfilled all the requirements of the Act, and accordingly on March 21st, 1883, Johnson paid to the Receiver of the Land Office $400 and entry fee (Trans., folio 86), and received from the Register his final receipt and duplicate certificate of purchase (folio 87) certifying that Johnson had purchased and paid for in full the land mentioned, and was entitled to receive a patent therefor. All these documents pursuant to the statute were forthwith transmitted by the Register and Receiver to the General Land Office at Washington.

On March 23d, 1883, Johnson for an expressed consideration of $400 conveyed the land in suit to one Charles E. Beach, by deed, recorded March 24, 1883,

in the Humboldt County Recorder's office (Trans., folios 33–35). On March 26, 1883, Beach conveyed the land, with other lands, to F. P. Hooper, J. A. Hooper and Josiah Bell, by deed recorded April 30th, 1883, in the Humbold County Recorders's office (Trans., folios 35–37). On July 27, 1883, the Hoopers and Bell conveyed to the California Redwood Company a great quantity of land, including this, with mills, railroads and other property, which deed was recorded on August 2nd, 1883, in said Humboldt County Recorder's office (Trans., folios 38–44).

No patent was issued or other action taken on Johnson's entry by the Land Office until March 8, 1888, when the Commissioner wrote to the local Land Office (Trans., folio 46) that a special agent had reported to him in November, 1887, that he was convinced there was wilful fraud in Johnson's entry, and that the entryman was in collusion with other parties when making the same, "as he was a man of no means, and conveyed the land to Beach immediately after entry for less than it would cost to make such entry. Said entry is accordingly held for cancellation." The letter further instructed the local Land Officers to notify the claimant of this action, advising him that if he failed to show cause within sixty days why his entry should be sustained, the same would be finally cancelled; and that if the Land Officers *had knowledge* that the land has been transferred or mortgaged they should also notify the transferee or mortgagee. The Commissioner's letter itself mentioned the deeds from Johnson to Beach, and from Beach to Hoopers and Bell, and referred to the county records. No further examination of records was apparently made

by the Land Office and no notice whatever of the impeding cancellation was given to the California Redwood Company. Notice was sent by mail to Johnson (but not received by him) and to "C. A. Beach" and "Hooper Brothers" (Trans., folio 69), and on January 8, 1889, the Receiver wrote the Commissioner of the General Land Office informing him of that fact, and that no hearing had been applied for. On March 11, 1889, another registered notice was mailed by the Register to Johnson and not received by him (Trans., folios 72, 73), and the local Land Office so notified the Commissioner on May 15, 1889 (folio 73), whereupon the Commissioner replied (folio 74) on June 7, 1889, reciting that these letters showed that the claimant "*was duly notified,*" and that the time had expired without his taking any action in the matter, and that "said entry is accordingly this "day cancelled. You will so note on your records and "hold the land subject to entry by the first qualified ap- "plicant." The duplicate certificate in the Land Office was accordingly defaced by having written across it "Cancelled by order Com. letter 'P' of June 7, 1889, S. C. Boom, Register," (Trans., folio 87).

On September 11, 1889, William Mahan made timber entry of the same land at the Humboldt Land Office, and a patent therefor was issued to him by the Government on March 10, 1891. This action was brought on December 1st, 1894, to obtain a decree that Mahan holds the patent in trust for the California Redwood Company.

It will be noticed, first, that no notice whatever was given, either to the original entryman or his recorded transferree, of the intended cancellation of entry; second,

that no proof whatever of fraud was ever made to the Land Office. The only suspicious circumstances recited by the Commissioner were that Johnson was a poor man (!); and that he had made a deed for nominal consideration within a few days after obtaining his certificate of purchase, and more than sixty days after making his sworn statement. These circumstances were expressly declared by the Supreme Court in *U. S.* vs. *Budd*, 144 U. S., 163, to "amount to little or nothing," to be "perfectly legitimate," and to "imply or suggest no wrong." The cancellation complained of was therefore made without notice to the parties interested, without charges, without hearing, and without any evidence of fraud.

Upon this summary of facts, the appellant claims and seeks by this brief to establish the following legal propositions:

1. That by final proof and payment the entryman and his assigns acquired a vested interest in the land, of which he could only be deprived by due process of law.

2. That the action of the Commissioner in assuming to cancel this entry without notice, without formulating charges, and without legal proof, was not due process of law, was beyond the scope of his jurisdiction, and was absolutely void.

3. That such cancellation being void does not alter the burden of proof, and that the record of entry and the certificate of purchase are *prima facie* evidence of plaintiff's right to the patent.

4. That because the Johnson entry was not lawfully cancelled, the patent to Mahan is held by him in trust for the California Redwood Company.

I.

NATURE OF ENTRYMAN'S TITLE.

The holder of a paid up certificate of purchase has a perfect equitable title which may be conveyed or devised, will descend to heirs and may be devised in the same manner as any legal title. It may be taken on execution, may be taxed and sold for delinquent taxes by the State, and will support the action of ejectment except against the United States. These are well known principles, for which it is unnecessary to cite authority. The United States Supreme Court has defined the character of these titles in many cases.

In *Carroll* vs. *Safford*, 3 How. U. S., 460, the Court says: "When the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held for it a final certificate which could no more be cancelled by the United States than a patent. It is true, if the land had been previously sold by the United States or reserved from sale, the certificate or patent might be recalled by the United States as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee. It is said the fee is not in the purchaser but in the United States until patent shall be issued. This is so technically at law, *but not in equity.*"

In *Witherspoon* vs. *Duncan*, 4 Wall., 210, the Court says: "According to the well known mode of proceeding at the Land Offices (established for the mutual convenience of buyer and seller) if the party is entitled by law to enter the land the Receiver gives him a certificate

of entry reciting the facts, by means of which in due time he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The Government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title. As the patent emanates directly from the President, it necessarily happens that years elapse before in the regular course of business in the General Land Office it can issue."

In *Simmons* vs. *Wagner*, 101 U. S., 260, the Court says: "It is well settled that when lands have once been sold by the United States and the purchase money paid, the lands sold are segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void, as long as the first sale continues in force. (*Wirth* vs. *Branson*, 98 U. S., 118; *Frisbee* vs. *Whitney*, 9 Wall., 187; *Litle* vs. *Arkansas*, 9 How., 314). Where the title to a patent has once become vested in a purchaser of Government lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. The execution and delivery of the patent, after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty."

In *Parsons* vs. *Venzke*, 164 U. S., 89, the Court says: "An entry is a contract. Whenever the local land officers approve the evidence of settlement and improvement and receive the cash price they issue a receiver's

receipt. Thereby a contract is entered into between the United States and the pre-emptor, and that contract is known as an entry. It may be like other contracts voidable, and is voidable if fraudulently and unlawfully made. The effect of the entry is to segregate the land entered from the public domain, and, while subject to such an entry, it cannot be appropriated to any other person, or for any other purpose. * * * *When by due proceedings in the proper tribunal* the entry is set aside and cancelled, the contract is also terminated."

It is unquestionably true that an entry like a patent is liable to be cancelled and set aside for fraud. The question to be here determined is what tribunal and upon what notice, pleading, and proofs, is competent to cancel it. Until cancelled, its holder is entitled to the same presumptions and protection as with other property. The issuance of a patent is a mere ministerial act under the foregoing decisions—a cog in the wheel of official routine. It would not be seriously contended that only after that ministerial act can the entryman claim his constitutional right to due process of law, and be put upon his defense, and that before patent issues he merely holds his property by the uncertain tenure of the whim of the chief clerk in the Land Office.

II.

THE CANCELLATION OF ENTRY WITHOUT NOTICE TO THE OWNER IS VOID.

The Commissioner of the General Land Office under no circumstances has power to cancel entries except upon notice to the parties interested, giving them an

opportunity to be heard, and his attempt to do so is void.

Orchard vs. *Alexander*, 157 U. S., 383.
Parsons vs. *Venzke*, 164 U. S., 89.
Cornelius vs. *Kessel*, 128 U. S., 456.
Johnson vs. *Towsley*, 15 Wall., 85.
Lindsey vs. *Hawes*, 2 Black., 554.
Lewis vs. *Shaw*, 57 Fed. Rep., 516; also 70 Fed. Rep., 289.
Wilson vs. *Fine*, 14 Sawy., 224.
Smith vs. *Ewing*, 11 Sawy., 56.
Stimson vs. *Clark*, 45 Fed. Rep., 760.
Jones vs. *United States*, 35 Fed. Rep., 561. (Reversed on appeal, but not on this point.)
Stimson Manfg. Co. vs. *Rawson*, 52 Fed. Rep., 426.
Montgomery vs. *U. S.*, 36 Fed. Rep., 5.
Brill vs. *Stiles*, 35 Ill., 309.
N. P. R. R. vs. *Barnes*, 51 N. W. Rep., 406.
Puget Mill Co. vs. *Brown*, 54 Fed. Rep., 98. (Affirmed on appeal, 59 Fed. Rep., 35.)
Stimson Land Co. vs. *Hollister*, 75 Fed. Rep., 941.
Caldwell vs. *Bush*, 45 Pac. Rep., 488.
Young vs. *Hanson*, 64 N. W. Rep., 654.
Delles vs. *Second Natl. Bank*, 50 Pac. Rep., 190.

In *Lindsey* vs. *Hawes*, *supra*, the Supreme Court reviews the authorities, and declares it to be the settled doctrine of the Court that a decision of the General Land Office rendered *ex parte*, without notice to parties interested, will be disregarded by the courts.

In *Cornelius* vs. *Kessel*, *supra*, an order of cancellation

of entry had been made by the Commissioner of the General Land Office, without notice to the parties interested, and the lands had been subsequently patented to another. The original entryman sued the patentee to obtain conveyance, and judgment in his favor was upheld by the Supreme Court, which said: "The power of supervision and correction (by the Commissioner of the General Land Office) is not an unlimited or an arbitrary power. It can be exercised only when the entry was made upon false testimony, or without authority of law. It can not be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other legally acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

In *Orchard* vs. *Alexander*, *supra* (p. 383), the Court says: "Of course this power of reviewing and setting aside the action of the local land officers is as was decided in *Cornelius* vs. *Kessel*, not arbitrary nor unlimited. It does not prevent judicial inquiry. (*Johnson* vs. *Towsley*, 13 Wall., 72.) A party who makes proofs which are accepted by the local land officers and pays his money for the land, has acquired an interest of which he can not be arbitrarily dispossessed. His interest is subject to State taxation. (*Carroll* vs. *Safford*, 3 How., 441; *Witherspoon* vs. *Duncan*, 4 Wall., 210). The Government holds the legal title in trust for him and he may

not be dispossessed of his legal rights without due process of law. *Due process in such case implies notice and a hearing.*"

In *Parsons* vs. *Venzke, supra*, the Court, defining the jurisdiction of the Land Department, says that it is "a jurisdiction not arbitrary nor unlimited *nor to be exercised without notice to the parties*, nor one beyond judicial review under the same conditions as other orders and rulings in the Land Department."

Section 2450 of the Revised Statutes provides: "All suspended entry cases are to be heard and determined upon principles of equity and justice as recognized by courts of equity." Do courts of equity render judgment without notice or proof?

In *Wilcox* vs. *Jackson*, 13 Peters, 511, it was held where the land officers exceed the jurisdiction conferred upon them, although not the result of any fraud or imposition, relief is nevertheless granted. "Their decisions are binding when acting within their jurisdiction, but when acting without the pale of their authority *they are to be regarded as mere nullities.*"

In deciding this case the learned Judge of the Court below merely said that it presents substantially the same questions as were raised in the case of the *California Redwood Company* vs. *Litle;* and in the opinion in the Litle case he declared that he considered himself bound upon this point of notice by the decision of this Court in the case of *American Mortgage Co.* vs. *Hopper*, 64 Fed. Rep., 553, and he based his determination of the question of the necessity of notice upon that ground solely. We think that the Judge overlooked a broad

distinction between this case and the Litle case, and also between this case and the *American Mortgage Co.* vs. *Hopper*. It is true that in the Litle case there was no proof of notice before cancellation of entry, but, on the other hand, there was proof of actual fraud in the entry itself. There is no such evidence here. In the Hopper case there was in fact a hearing and contest in the Land Department, and evidence was introduced, and the entryman, if not his assignee, was actually notified and attended the hearing. All these conditions are lacking in the case at bar. The decision in the Hopper case declares that "The conclusions of the Land Office having been arrived at *apparently within the scope of its authority* are *prima facie* correct," and that the burden of proof is upon the one attacking them. We can find no fault with that declaration of the law in a case where notice has been given. But where no notice was given to the parties interested before cancellation of the entry, how can it be said that the decision was apparently within the scope of the authority of the Land Office? The decision of no tribunal is *prima facie* valid or within the scope of its authority unless it has jurisdiction of the person as well as of the subject matter and exercises that jurisdiction in the mode prescribed by law; and if the lack of jurisdiction appears, whether on collateral attack or otherwise, the decision is not merely voidable, but void. It is elementary justice that no man's case shall be judged unheard.

It seems superfluous to argue that the course pursued by the Land Office in the case at bar did not constitute due process of law. No court or official in Christendom

is endowed with such irresponsible and tyrannical power. As was said by Judge Deady in *Wilson* vs. *Fine*, *supra*, "the fiat of an officer of the Land Department is not law; nor is this a government by pasha."

We claim, therefore, that the case at bar is distinguishable from *American Mortgage Co.* vs. *Hopper*, because in that case there was at least a hearing and proofs and notice to the claimant if not to the owner, but in ours there was no pretence even of that, and if that decision is regarded as a precedent against us, it is opposed to the later decisions of the Supreme Court in *Orchard* vs. *Alexander* and *Parsons* vs. *Venzke* and should be modified.

III.

PLAINTIFF'S UNCANCELLED ENTRY AND CERTIFICATE OF PURCHASE WERE PRIMA FACIE PROOF OF ITS RIGHT TO A PATENT.

The decision in *American Mortgage Co.* vs. *Hopper*, is further cited as a precedent against us in the opinion of the trial Court, to the effect that although the cancellation of the entry may have been void as made without notice, nevertheless in some way it deprives us of the presumption that our entry was regular, and casts on us the burden of proving as an independent fact, in addition to the certificate, that the entryman performed "all the acts required of him by the law to perfect and complete his entry." We admit that principle to be good in its application to the Litle case (in which Judge Morrow rendered his opinion), because fraud in the entry

was proved, and we tried to meet its requirements there by showing our *bona fide* purchase; and we admit its correctness in *American Mortgage Co.* vs. *Hopper*, provided that notice of the hearing in the Land Office was given in that case. But we submit that it has no application in the case at bar. The principle proceeds on the assumption that because the entryman would have no vested rights if there has been fraud in his purchase; therefore, if he is charged with fraud, his entry is not entitled to consideration unless coupled with independent proofs of all the facts recited in it, and before any evidence impeaching the entry has been given. We respectfully submit that this reasoning is fallacious and comprises a vicious circle. It assumes that the entryman was guilty of fraud and throws on him the burden of proving his innocence before it is attacked. It is said that there is a presumption in favor of the regularity of the patent, but there is an equal presumption in favor of the regularity of the prior entry and certificate of purchase. One presumption should be set off against the other, and first in time is first in right. There is no *greater* presumption in favor of the patent than in favor of the certificate. If the attempted cancellation by the Land Department was void, as we have shown, it follows as a necessary result that it must be disregarded for every purpose; that it took away no rights and conferred none; that it does not affect our certificate of purchase, and that we may claim all the legal presumptions created by that certificate, which recites that we are entitled to a patent. The certificate is regular upon its face, and was issued after

"satisfactory proof" had been given to the Register and Receiver, and upon an affidavit of the entryman showing all the facts required by the statute. It is true that it would be void if that affidavit was false, but its falsity is a matter of defense. Our entry being regular in form and prior in time confers a right superior to respondent's patent, unless he can successfully impeach it for perjury or for some other sufficient reason, but it lies with him to show cause. He has accepted the patent *cum onere.*

We find nothing in the cases cited as authority in *American Mortgage Co.* vs. *Hopper* to support the proposition that the burden of proof of innocence is shifted to the plaintiff, where the cancellation of entry by the Land Department is void. The cases of *Lee* vs. *Johnson* and *Bohall* vs. *Dilla,* and *Puget Mill Co.* vs. *Brown,* merely show that affirmative evidence was given, presumably by the patentees, tending to prove that the contesting entrymen were not in fact entitled to make the entries relied on. Upon those facts the Court used the words quoted in the Hopper decision: "He must in all cases show that but for the error of fraud or imposition of which he complains he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee." It is nowhere held in those decisions that the certificate of entry is not competent and sufficient evidence of the entryman's right to a patent. They merely declare that it is not *conclusive* evidence. On the other hand, in *Cornelius* vs. *Kessel, supra,* where the certificate of entry had been unlawfully cancelled in the Land Office and patent issued to another, the Supreme Court expressly declares: "The interest of Davidson in the

tract, which embraces the premises in controversy, acquired by him by his entry, was not lost or *impaired* by the order directing its cancellation. That order was illegally made, and those claiming under him *can stand upon the original entry*, and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner. As that entry, with the payment of the purchase money, gave Davidson a right to a patent from the United States, his heirs are entitled to a conveyance of the legal title from those holding under the patent wrongfully issued to Puffer."

U. S. vs. *Steenerson*, 50 Fed. Red., 504, which is cited in the decision of *American Mortgage Co.* vs. *Hopper*, also seems to us to be an authority against the conclusion of the Court on the question of burden of proof. That was an action of replevin by the Government for logs cut upon land which had been entered by one Hanson, who had obtained a certificate of purchase, and had transferred his claim of title to the defendant. The Commissioner of the General Land Office attempted to cancel the certificate, on the ground of fraud in the entry, and the Court, oddly enough, declared that it could not be successfully maintained that the Commissioner had not the power to annul the entry for fraud, and at the same time says that the action of the Commissioner, being *ex parte*, was not conclusive, but can be collaterally attacked. It seems to us that this is nothing more than saying that if the Commissioner was right in thinking that it was fraudulent, the entry was void; but if he was wrong, it was not. The decision certainly attaches no weight to his ruling in any way, for the case proceeded precisely as if

it had never been made. The Government proved that the land had once been part of the public domain, and that the logs had been cut from it. The defendant then offered his certificate of entry without further proof; and the Government then undertook to prove, not the cancellation, but the original fraud *de novo*, assuming the burden of proof. The Court says (p. 508): "When evidence of this kind is offered by the claimant" (*i. e.* evidence of entry by introduction of the certificate of purchase, for that was in fact the only evidence there offered by the claimant) "it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty," etc. These words are quoted in the Hopper decision as authority for holding that the certificate must be accompanied by other proofs before it is attacked; but we are confident that so far from supporting that view the Steenerson decision is in fact an authority in our favor. In the final paragraph of that decision the Court says: "The evidence which the United States sought to "introduce tended to prove that Hanson entered the "land, not for settlement and improvement by him for "his own benefit, but for the express benefit of the log- "ging company, and under an agreement with them. " * * * Such facts, *if proven*, would certainly "show that Hanson never acquired a valid title, legal or "equitable, to the land as against the United States, and "as the defendants, in support of their right to the logs "cut from the land, put in evidence the entry and de- "claratory statement made by Hanson, it was *open to the* " *United States to prove* that such entry was in violation

" of the statute, *and the statement was false, and therefore* " no rights were acquired thereunder by Hanson or his " grantees, who aided in the perpetration of the fraud " thus established. We hold, therefore, that it was error " to rule out the evidence offered by the United States." Under the construction given to the Steenerson case in *American Mortgage Co.* vs. *Hopper*, this order of proof is reversed, and the entryman is required to disprove fraud before the Government proves anything.

We respectfully urge that the doctrine that the entryman in addition to his certificate must prove *de novo*, and independently by other evidence, all the facts in the certificate recited, as part of his case in chief, and in advance of any evidence impeaching it, can not be justified in principle, is not supported by authority, and is directly opposed to the decision of the Supreme Court in *Cornelius* vs. *Kessel.*

IV.

THE RESPONDENT HOLDS THE PATENT IN TRUST.

The Land Office has no power to patent to one person land which has been previously sold to another, unless the prior sale has been legally cancelled and vacated, and if it shall attempt to do so, the patentee will be adjudged to hold the title in trust for the holder of the prior certificate.

Simmons vs. *Wagner*, 101 U. S., 260.
Sherman vs. *Buick*, 93 U. S., 209.
Wirth vs. *Branson*, 98 Cal., 118.

Frisbie vs. *Whitney*, 9 Wall., 187.
Lytle vs. *Arkansas*, 9 How., 314.
Patterson vs. *Tatum*, 3 Saw., 164.

Many other authorities may be cited to the same point, but we do not understand that any doubt exists as to the proposition.

Summary.

In conclusion, we claim that the proof of our prior entry and certificate of purchase, being regular upon its face, and our deraignment of title from the entryman, made out a *prima facie* case against the patentee; that to defeat it, he must establish either a valid cancellation of our entry by the Land Office, or that such fraud or irregularity existed as would warrant its cancellation; that he has failed to do so; that a decree should have been given to plaintiff as prayed for, and that the judgment in favor of defendant should be reversed.

Respectfully submitted,

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